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15 **UNITED STATES DISTRICT COURT**

16 **DISTRICT OF NEVADA**

17 BROOKE CARDOZA, *et al.*, all on behalf  
18 of themselves and all similarly-situated  
19 individuals,

20 Plaintiffs,

21 vs.

22 BLOOMIN' BRANDS, INC., a Delaware  
23 Corporation; OSI RESTAURANT  
24 PARTNERS, LLC, a Florida Limited  
25 Liability Company; OUTBACK  
STEAKHOUSE OF FLORIDA, LLC, a  
Florida Limited Liability Company; OS  
RESTAURANT SERVICES, LLC, a  
Florida Limited Liability Company; and  
DOES 5 through 100, Inclusive,

Defendants.

**CASE NO.: 2:13-cv-01820-JAD-NJK**

**PLAINTIFFS' MOTION FOR FINAL  
APPROVAL OF FLSA CLASS  
SETTLEMENT**

COME NOW the above-captioned Plaintiffs, by and through Class Counsel, and move this Court for an Order granting Plaintiffs' Motion for Final Approval of Settlement, and for other relief as described herein.

This Motion is based on the Memorandum of Points and Authorities below, all papers and exhibits on file herein, and any oral argument this Court sees fit to allow at hearing on this matter.

1                   **MEMORANDUM OF POINTS AND AUTHORITIES**

2                   **I. INTRODUCTION**

3                 Plaintiffs Brooke Cardoza, *et al.* (“Plaintiffs”), and Defendants Bloomin’ Brands, Inc., a  
4                 Delaware Corporation; OSI Restaurant Partners, LLC, a Florida Limited Liability Company;  
5                 Outback Steakhouse of Florida, LLC, a Florida Limited Liability Company; and OS Restaurant  
6                 Services, LLC (collectively, “Defendants”) previously reached a settlement of the above-captioned  
7                 wage-and-hour class action. On April 19, 2016, the Court granted preliminary approval of the  
8                 settlement and approved the notice to be sent to Class Members. ECF No. 430. Having completed  
9                 the notice procedure approved by the Court, the parties now seek final approval of settlement. As  
10                 previously articulated for the Court in their Motion for Preliminary Approval, Class Counsel  
11                 believe that the proposed final settlement is fair and adequately compensates the members of the  
12                 class for the alleged off-the-clock work that they performed.

13                 **II. FACTUAL BACKGROUND**

14                 Plaintiffs commenced this lawsuit (the “Lawsuit” or “Action”) by filing, on October 4,  
15                 2013, a complaint against Defendants in *Cardoza v. Bloomin’ Brands, Inc.*, Case No. 2:13-cv-  
16                 01820-JAC-(NJK), in the United States District Court for the District of Nevada, asserting a claim  
17                 for violation of the Fair Labor Standards Act (“FLSA”). ECF No. 1. Plaintiffs filed a First  
18                 Amended Complaint on December 24, 2013, adding twelve (12) additional named Plaintiffs and  
19                 adding claims under the Nevada Wage and Hour Law, the Illinois Wage Payment and Collection  
20                 Act, the Illinois Minimum Wage Act, the Maryland Wage Payment and Collection Law, the New  
21                 York Labor Law, the North Carolina Wage and Hour Act, and the Ohio Minimum Fair Wage  
22                 Standards Act. ECF No. 2. On August 18, 2014, Plaintiffs filed their Second Amended  
23                 Complaint in which they dropped their claims under the Nevada Wage and Hour Law following a  
24                 motion to dismiss that was granted in part. ECF No. 126. On September 15, 2015, Plaintiffs filed  
25                 their Third Amended Complaint, adding an additional nine (9) named Plaintiffs and adding claims  
26                 under the South Carolina Payment of Wages Act and Massachusetts Minimum Wage Act. ECF  
27                 No. 357 (“Complaint”). The Third Amended Complaint is the operative complaint in this action.

28                 In the Lawsuit, Plaintiffs asserted wage and hour claims under the FLSA, 29 U.S.C. § 201,

1 *et seq.* and various state laws, pertaining to hours of work, payment of wages, and overtime  
 2 compensation. In the Complaint, named Plaintiffs brought claims on behalf of themselves and  
 3 other similarly situated current and former non-franchise Outback Steakhouse restaurant hourly  
 4 employees in the United States for the applicable statute of limitations periods, either as a  
 5 nationwide collective action pursuant to 29 U.S.C. § 216(b), or as class actions pursuant to Fed. R.  
 6 Civ. P. 23 for current and former hourly employees who worked in Illinois, Maryland, New York,  
 7 North Carolina, Ohio, South Carolina, and Massachusetts.

8 On October 24, 2014, the Court granted Plaintiffs' Motion for Conditional Certification of  
 9 Collective Action. ECF No. 151. On February 27, 2015, Plaintiffs sent Notice of Collective Action  
 10 and Consent-to-Join forms to 135,338 current and former employees of Outback Steakhouse  
 11 restaurants and an additional 4,141 notices on April 10, 2015, for a total of 139,469 notices.  
 12 Declaration of Don Springmeyer ("Springmeyer Decl."), attached hereto as **Exhibit "A"** at ¶ 10.  
 13 In response, 9,491 – or less than 7 percent – of current and former Outback employees from across  
 14 the country to whom notices were sent chose to opt-in to this action ("Opt-in Plaintiffs"). *Id.*

15 Defendants denied Plaintiffs' allegations and asserted a number of affirmative defenses.  
 16 For example, Defendants contend nearly half the named Plaintiffs admitted their minimum wage  
 17 and overtime claims are without merit, citing the following evidence in support of this contention:

- 18 • Plaintiff Brown "concede[d] he does not have minimum wage claims."
- 19 • Plaintiff Cardoza stated under oath "I do not believe that I was paid less than the  
   20 federal minimum wage."
- 21 • Plaintiffs Boharski, Brown, Cardoza, Connelley, Lassman, Murphy, Nesbitt,  
   22 Talasko, and Verrengia admitted that they were paid in excess of "the applicable federal  
   23 minimum wage per hour for all hours worked in the workweek."
- 24 • Plaintiffs Boharski, Brown, Cardoza, Connelley, Lassman, Loveall, Miller,  
   25 Murphy, Talasko, and Zimmerman admitted that they "did not work any overtime at an  
   26 Outback Steakhouse restaurant."
- 27 • Plaintiffs Hancock and Verrengia "clarified" that they "do not allege claims for  
   28 violation of FLSA overtime provisions."

1 Of the 949 Collective Action Discovery Plaintiffs chosen for discovery, 419—representing  
 2 44.2%—did not respond in any manner to the written discovery (including Requests for  
 3 Admission) after being given sixty days to respond. Defendants contend that, by failing to  
 4 respond, that group of individuals admitted they have no claims. And of those who did respond to  
 5 the written discovery, Defendants contend that numerous Collective Action Discovery Plaintiffs  
 6 admitted in their written discovery responses that they did not work off-the-clock:<sup>1</sup>

- 7 • “I did not perform any work for which I was not paid.” – Bowling Green, Kentucky  
 8 hostess and busser, 2013.
- 9 • “I did not work off-the-clock.” – Waikiki, Hawaii, hostess and busser, August 5,  
 10 2014 to December 10, 2014.
- 11 • “To my recollection, I have not worked off the clock during my employment with  
 12 Outback.” – Tulsa, Oklahoma, curbside takeaway and server, October 2011 to present.
- 13 • “I cannot [sic] any off the clock work at this time.” – Matthews, North Carolina,  
 14 hostess and server, July 2010 to April 2012.
- 15 • “I have not worked off-the-clock and I have not completed online training or in-  
 16 store training without pay. I have not attended meetings or events without pay.” –  
 17 Wisconsin, server, September 2014 to November 2014.
- 18 • “I have no claims to assert against each of the DEFENDANTS in this Action.” –  
 19 Ohio, busser, June 2011 to August 2012.
- 20 • “I have not worked off the clock at Outback.” – Pennsylvania, host and takeaway  
 21 server, February 2002 to June 2006.

22 Defendants also denied the existence of any class-wide decision, policy or plan to require  
 23 or allow Settlement Class Members to work off-the-clock. Defendants contend the claims in the  
 24 Action are amenable to neither class nor collective action treatment because there are too many  
 25 variations and individualized issues presented within Plaintiffs’ proposed class, which Defendants

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26  
 27 <sup>1</sup> Quotes below reference the location, position(s), and employment time period, but not the  
 name, of referenced Collective Action Discovery Plaintiffs.  
 28

1 claim were borne out in written discovery responses from the Collective Action Discovery  
2 Plaintiffs. Defendants cited to Plaintiffs the following evidence in support of their position that  
3 class or collective action treatment is not appropriate:

- 4 • At least 77.3% of Collective Action Discovery Plaintiffs admitted that “Outback  
5 Time” was not a term communicated to them by any manager of an Outback Steakhouse  
6 restaurant.
- 7 • At least 68.2% of Collective Action Discovery Plaintiffs admitted that they were  
8 aware that Defendants had a policy prohibiting off-the-clock work;
- 9 • At least 68.9% of Collective Action Discovery Plaintiffs admitted that they did not  
10 work enough hours in a week to reach the FLSA’s overtime threshold;
- 11 • At least 82.4% of Collective Action Discovery Plaintiffs admitted that they did not  
12 work at any events (charitable, catering or marketing) sponsored by an Outback  
13 Steakhouse restaurant;
- 14 • At least 67% of Collective Action Discovery Plaintiffs admitted that their off-the-  
15 clock experiences differed by shift;
- 16 • At least 67.4% of Collective Action Discovery Plaintiffs admitted that their off-the-  
17 clock experiences differed by manager;
- 18 • At least 64.5% of Collective Action Discovery Plaintiffs admitted that their off-the-  
19 clock experiences differed by job duties;
- 20 • At least 61.8% of Collective Action Discovery Plaintiffs admitted that their off-the-  
21 clock experiences differed by job position; and,
- 22 • At least 54.5% of Collective Action Discovery Plaintiffs admitted that their off-the-  
23 clock experiences differed by location.
- 24 • At least 93.9% of Collective Action Discovery Plaintiffs admitted that they did not  
25 make any record of their off-the-clock work.

26 **A. Class Counsel’s Investigation**

27 Class Counsel conducted an extensive investigation into the facts of the class action and  
28 the Named Plaintiffs and Settlement Class Members’ claims, including through formal discovery,

1 informal disclosures between the parties, and other investigations undertaken by Class Counsel.  
 2 Springmeyer Decl. at ¶¶ 6-9. Furthermore, the parties engaged in extensive negotiations and  
 3 exchanged a copious amount of data, documents, and other information. *Id.*

4       Class Counsel collected detailed information and documents, where available, from  
 5 thousands of Class Members regarding hours worked by, and wages paid to, such Class Members.  
 6 *Id.* at ¶ 7. Class Counsel thereafter interviewed hundreds of Class Members concerning their  
 7 claims. *Id.* Class Counsel drafted and served hundreds of written discovery requests, which were  
 8 responded to by Defendants. *Id.* In addition, Class Counsel reviewed and analyzed tens of  
 9 thousands of pages of documents produced by Defendants relating to Defendants' employment  
 10 practices and the hours worked by, and wages paid to, the Class Members. *Id.* Class Counsel also  
 11 took depositions of several of Defendants' Managing Partners and Joint Venture Partners from  
 12 around the country, as well as several of Defendants' corporate-level employees. *Id.* at ¶ 8. Class  
 13 Counsel retained a statistical expert to further review the information and documentation collected  
 14 from Class Members and from Defendants' documents and discovery responses. *Id.* at ¶ 9. The  
 15 statistical expert's analysis of information and documentation assisted Class Counsel in assessing  
 16 the value of the Class Members' potential claims. *Id.* at ¶ 9. This investigation provided Class  
 17 Counsel a more than adequate basis to reach an informed compromise.

18       Based on Class Counsel's investigation and evaluation of this case, Plaintiffs have  
 19 concluded that the settlement with Defendants as set forth in the Settlement Agreement is fair,  
 20 reasonable, and adequate and is in the best interest of the Settlement Class in light of all known  
 21 facts and circumstances, including the risk of significant delay, risk that the Action would not  
 22 proceed on a collective or class action basis, defenses asserted by Defendants, and numerous  
 23 potential appellate issues. *Id.* at ¶ 10.

24       **B.       The Mediation and Resultant Settlement**

25       On October 29, 2015, the parties participated in a mediation before Mark Rudy, a highly-  
 26 regarded mediator, with a specialty in wage-and-hour class actions. *Id.* at ¶ 3. The parties were  
 27 unable to reach a settlement after the initial mediation session before Mr. Rudy. Following the  
 28 initial mediation session, the parties continued their negotiations with Mr. Rudy's ongoing

1 assistance and, after several weeks of negotiations following the initial mediation session, the  
 2 parties reached an agreement to settle the action on the terms set forth below. *Id.*

3       **C.     Summary of the Key Terms of the Settlement**

4           1.     The Settlement Fund

5           The settlement creates a \$3,000,000 fund (the “Settlement Fund”). ECF No. 419-1 at  
 6 ¶2.5.A. This fund is to be used to pay settlement payments to Settlement Class Members,  
 7 discharge Defendants’ obligation to pay attorneys’ fees and costs under the FLSA, pay service  
 8 awards to Named Plaintiffs and pay any employee and employer payroll taxes associated with the  
 9 settlement payments.<sup>2</sup> *Id.* Under the settlement reached, administrative costs will not be paid  
 10 from the Settlement Fund, but will instead be paid by Defendants over and above the Settlement  
 11 Fund. *Id.* at ¶2.6.A. None of the \$3 million settlement fund will revert to Defendants. Under the  
 12 terms of the Agreement, funds from uncashed checks will be paid to the appropriate state  
 13 authorities. *Id.* at ¶2.8.C. As contemplated by the settlement, Class Counsel has filed a motion  
 14 for attorneys’ fees and costs, to be heard concurrently with this motion.

15           2.     Calculation of Class Members’ Individual Payments

16           Under the Settlement Agreement, each Participating Settlement Class Member (i.e. a  
 17 Settlement Class Member who is a Named Plaintiff, an Opt-in Plaintiff, or who submitted a valid  
 18 claim form) is to receive a pro-rata share of the Net Settlement Fund based on the number of hours  
 19 recorded in the Participating Settlement Class Member’s payroll records during the applicable  
 20 class period (which varies, depending on the state in which the employee worked) as a fraction of  
 21 all hours recorded in Defendants’ payroll records by all Settlement Class Members during the  
 22 applicable class periods. *Id.* at ¶2.7(B). In addition, each Participating Class Member will be  
 23 eligible to receive a pro rata share of at least 50% of the Residual Claim Benefit Fund – which is  
 24 comprised of the unclaimed remainder of the Net Settlement Fund.<sup>3</sup>

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25 \_\_\_\_\_  
 26 <sup>2</sup> This amount was negotiated based on the then-existing number of Class Members, and the  
 27 settlement is conditioned upon the final class list being no greater than 5% of that amount.

28 <sup>3</sup> Up to 50% of the Residual Benefit Fund will be distributed to Class Counsel in recognition of  
 (footnote continued)

1           3.       Settlement Administration and Notice

2           Rust Consulting serves as the Settlement Administrator. Under the Settlement Agreement,  
 3 Rust Consulting is responsible for all the negotiated class notice and claims administration  
 4 functions, including: (i) compiling the class list from information provided by the parties; (ii)  
 5 handling all mailings to the Settlement Class Members; (iii) tracing undeliverable mailings; (iv)  
 6 recording and tracking responses to the mailing to the Settlement Class Members; (v) responding  
 7 to inquiries made by the Settlement Class Members; (vi) calculating Gross and Net Individual  
 8 Settlement Payments; (vii) issuing and mailing Settlement Payments; (viii) reporting payment of  
 9 the Gross and Net Individual Settlement Payments to all required taxing and other authorities; (ix)  
 10 making appropriate withholdings from the Gross Individual Settlement Payments; (x) remitting all  
 11 Employee Payroll Taxes and Employer Payroll Taxes and other required payments withheld to the  
 12 proper authorities; (xi) establishing a Qualified Settlement Fund (“QSF”) pursuant to Section  
 13 468B(g) of the Internal Revenue Code, and regulations promulgated thereunder for the purpose of  
 14 administering the Settlement; (xii) transmitting all Claim Forms from Participating Class Members  
 15 to Plaintiffs’ counsel; and (xiii) other related tasks as mutually agreed to by the parties. *Id.* at  
 16 ¶2.6.

17           In accordance with the Settlement Agreement, and as approved by the Court, the  
 18 Settlement Administrator compiled the class list from information provided by the parties and sent  
 19 the approved class notice to 166,786 identified Class Members on or about June 8, 2016. *See*  
 20 Declaration of Amanda Myette, attached hereto as **Exhibit “B”** at ¶ 10. Of the 166,786 notices  
 21 that were sent, 24,794 were returned as undeliverable with no forwarding address. *Id.* at ¶ 11. The  
 22 Settlement Administrator then attempted to trace and re-send notices to those with bad addresses.  
 23 *See id.* at ¶¶ 11-12. Of the 166,786 notices mailed, the Settlement Administrator received a total of  
 24 10,707 claim forms prior to the deadline. *Id.* at ¶ 13. The Settlement Administrator also received  
 25 44 claim forms from Class Members seeking to assert claims whose claims forms were

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26  
 27           their agreement not to seek their full lodestar in their request for attorneys’ fees. *Id.* at  
 ¶ 2.7.B.(iii)(i).

28

1 postmarked after the deadline. *Id.*

2           4.       The Positive Response to the Settlement Agreement

3           The class notice notified Class Members of the Settlement Agreement and the opportunity  
 4 to participate in the settlement. A total of 18,091 current or former Outback employees submitted  
 5 timely claim forms, or were otherwise included as Class Members under the terms of the  
 6 Settlement Agreement.<sup>4</sup> *See id.* at ¶ 14. Only 26 of the 166,786 Class Members, or .015 percent of  
 7 the class, sought to be excluded from the class. *See id.* at ¶ 115. Tellingly, there was not a single  
 8 objection from the 166,786 Class Members to the proposed settlement. *See id.* at ¶ 15.

9           **III. FINAL APPROVAL OF THE SETTLEMENT IS APPROPRIATE**<sup>5</sup>

10          The law strongly favors settlements, particularly where complex class action litigation is  
 11 concerned. *See Class Plaintiffs v. City of Seattle*, 955 F.2d 1268, 1276 (9th Cir. 1992). Settlement  
 12 of a class action, however, is subject to the court's approval. Fed. R. Civ. P. 23(e). Similarly,  
 13 FLSA class action claims may be settled under the supervision of the Department of Labor or with  
 14 court approval. *See Lynn's Food Stores, Inc. v. United States*, 679 F.2d 1350, 1352-53 (11th Cir.  
 15 1982). When the parties to a putative class action reach a settlement agreement prior to class  
 16 certification, "courts must peruse the proposed compromise to ratify both the propriety of the  
 17 certification and the fairness of the settlement." *Staton v. Boeing Co.*, 327 F.3d 938, 952 (9th Cir.  
 18 2003).

19          Court approval of a class action settlement follows a three-step procedure: "(1) preliminary  
 20 approval of the proposed settlement at an informal hearing; (2) dissemination of mailed ... or

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21

22          <sup>4</sup> After the deadline for filing claims, the Settlement Administrator received forty-four (44)  
 23 additional claim forms from Class Members. After consultation, Plaintiffs and Defendants have  
 24 stipulated, with Court approval, that Class Members whose claim forms were untimely, but  
 25 received on or before October 7, 2016 will be eligible to participate in the Settlement. A  
 26 stipulation and order for the Court's review and approval is being filed concurrently herewith.

27          <sup>5</sup> Defendants do not necessarily agree with the positions taken by Plaintiffs in this brief or  
 28 concede the merits of Plaintiffs' claims; however, Defendants do not oppose Plaintiffs' request for  
 29 final approval of the settlement and do not oppose final certification of the Settlement Class solely  
 30 for the purpose of settlement of this lawsuit, subject to the conditions set forth in the Settlement  
 31 Agreement.

1 published notice of the settlement to all affected Class Members; and (3) a ‘formal fairness  
 2 hearing’ or final settlement approval hearing, at which Class Members may be heard regarding the  
 3 settlement, and at which evidence and argument concerning the fairness, adequacy, and  
 4 reasonableness of the settlement may be presented.” *Harris v. U.S. Physical Therapy, Inc.*, 2012  
 5 WL 3277278, at \*3 (D. Nev. July 18, 2012), *report and recommendation adopted*, 2012 WL  
 6 3277276 (D. Nev. Aug. 9, 2012) (quoting Manual for Complex Litigation (Fourth) § 21.632  
 7 (2008)).

8       The first two steps of the class settlement approval process – preliminary approval and  
 9 mailing of notice – have been completed. The final step for the Court is now the final settlement  
 10 hearing to determine the fairness, adequacy, and reasonableness of the settlement. *Harris*, 2012  
 11 WL 3277278, at \*3. As detailed below, the settlement was fair, adequate, and reasonable and  
 12 achieved the best result possible for the Class. Accordingly, the Court should enter an order of  
 13 final approval of the settlement.

14       A.     **The Settlement Was the Result of Non-Collusive, Arm’s-Length, Informed**  
 15                   **Negotiations**

16       The parties settled this case after over two years of heavily contested litigation, and only  
 17 after extensive, arms-length negotiations that occurred during mediation under the supervision of  
 18 Mark Rudy, an experienced and well regarded mediator, followed by several weeks of negotiation,  
 19 in which the mediator remained involved. Springmeyer Decl. at ¶ 3. Plaintiffs were represented  
 20 by four experienced class action firms and Defendants were represented by equally experienced  
 21 defense firm, including Gibson Dunn. By the time of the initial mediation, Class Counsel had  
 22 thoroughly researched the applicable law on the FLSA claims, the class certification law, and the  
 23 state laws on both merits (state wage and hour law) and state class certification. *Id.* at ¶ 5. They  
 24 had diligently investigated the facts and interviewed hundreds of Opt-in Plaintiffs. *Id.* at ¶ 6.  
 25 They had briefed a motion to dismiss, as well as a Motion for Conditional Class Certification. *Id.*

26       Class Counsel also collected detailed information and documents, where available, from  
 27 thousands of Class Members regarding hours worked by, and wages paid to, such Class Members.  
 28 *Id.* at ¶ 7. Class Counsel thereafter interviewed hundreds of the Class Members concerning their

1 claims. *Id.* Class Counsel drafted and served hundreds of written discovery requests, which were  
 2 responded to by Defendants. *Id.* In addition, Class Counsel reviewed and analyzed tens of  
 3 thousands of pages of documents produced by Defendants relating to Defendants' employment  
 4 practices and the hours worked by, and wages paid to, members of the class. *Id.* Class Counsel  
 5 also took the depositions of several of Defendants' Managing Partners and Joint Venture Partners  
 6 from around the country, as well as several of Defendants' corporate-level employees. *Id.* at ¶ 8.  
 7 Class Counsel retained a statistical expert to further review the information and documentation  
 8 collected from Class Members and from Defendants' documents and discovery responses. *Id.* at  
 9 ¶ 9. The statistical expert's analysis of information and documentation assisted Class Counsel in  
 10 assessing the value of potential claims by the class. *Id.* at ¶ 9. This investigation provided Class  
 11 Counsel a more than adequate basis to reach an informed compromise.

12 Accordingly, the process by which the parties reached the settlement weighs in favor of  
 13 preliminary approval. *See Nen Thio*, 14 F. Supp. 3d at 1334 (settlement reached with assistance of  
 14 experienced class action mediator after review of payroll data weighed in favor of preliminary  
 15 approval); *Villegas v. J.P. Morgan Chase & Co.*, 2012 WL 5878390, at \*6 (N.D. Cal. Nov. 21,  
 16 2012) (settlement reached with assistance of experienced mediator after review of data  
 17 demonstrates lack of collusion).<sup>6</sup>

18       **B. The Proposed Settlement Has No Obvious Deficiencies**

19 Here, the settlement has no obvious deficiencies or signs of collusion. Rather, Defendants  
 20 have agreed to pay \$3,000,000, a substantial sum of money, in settlement of the claims asserted.  
 21 No particular group of Class Members is left out or treated unfavorably. No new claims are being  
 22 added to the settlement after it was negotiated. There is no reversion or clear-sailing provision on  
 23 fees.<sup>7</sup> The claim form serves the legitimate purpose of identifying class members with off-the-

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24  
 25       <sup>6</sup> The Settlement also lacks other "subtle signs" of collusion that warrant caution. *See In re*  
*Bluetooth Headset Products Liab. Litig.*, 654 F.3d 935, 947 (9th Cir. 2011).

26       <sup>7</sup> *In re Bluetooth Headset Products Liab. Litig.*, 654 F.3d at 948-49 (recognizing "clear sailing"  
 27 provisions are not prohibited but require court to be "careful to avoid awarding 'unreasonably  
 28 high' fees simply because they are uncontested").

1 clock time, wishing to pursue their claim and exercise their opt in rights.<sup>8</sup> And Class Counsel  
 2 agreed to waive requesting their full lodestar; rather, Class Counsel agreed to provide Settlement  
 3 Class Members with the first preference to claim otherwise unclaimed settlement funds.<sup>9</sup> So, after  
 4 payment of attorney's fees and certain other costs, all of the settlement funds will be distributed to  
 5 the Settlement Class Members who submit timely and valid claims – the very people who are most  
 6 likely to have been significantly damaged by the alleged misconduct and who would likely have  
 7 come forward if trial was required.

8       In exchange for this consideration, Defendants will receive releases from all Settlement  
 9 Class Members who did not exclude themselves from the Settlement. The scope of the releases is  
 10 not unlimited, but extends only to claims based on the facts alleged or which could have been  
 11 alleged in this Action.

12       Accordingly, there are no obvious deficiencies precluding preliminary approval of the  
 13 settlement. *See Tijero v. Aaron Bros., Inc.*, 301 F.R.D. 314, 324-25 (N.D. Cal. 2013) (finding no  
 14 obvious deficiencies where “the settlement confers tangible monetary benefits to the class—  
 15 namely, a gross settlement amount of \$800,000[,] [t]here is no indication that the proposed  
 16 settlement improperly grants preferential treatment to class representatives or segments of the  
 17 class[, and] [t]he methodology agreed to by the parties for allocating the Net Settlement Fund  
 18 appears fair and reasonable.”); *Collins v. Cargill Meat Solutions Corp.*, 274 F.R.D. 294, 302 (E.D.  
 19 Cal. 2011) (finding no obvious deficiencies where settlement provides for \$150,000 payment,  
 20 entire settlement payment is distributed to Class Members who make timely claims, and  
 21 settlement payments to be determined based on number of weeks worked by each class member);  
 22 *Nen Thio*, 14 F. Supp. 3d at 1334 (settlement had no obvious deficiencies where the scope of the  
 23 release, while broad, “is acceptable because the claims released are limited to those based upon the  
 24 facts set forth in the First Amended Complaint”); *Custom LED, LLC v. eBay, Inc.*, 2013 WL  
 25 \_\_\_\_\_

26       <sup>8</sup> *Millan v. Cascade Water Servs.*, 310 F.R.D. 593 (E.D. Cal. 2015).

27       <sup>9</sup> As discussed below, the amount of the Settlement Fund allocated for attorneys' fees and costs  
 28 does not constitute a disproportionate distribution to Class Counsel.

1 6114379, at \*4, \*7 (N.D. Cal. Nov. 20, 2013) (scope of release in class action settlement was not  
 2 improperly broad where it released all claims, “known or unknown,” “arising out of or relating in  
 3 any way to any of the legal, factual, or other allegations made in the Action, or any legal theories  
 4 that could have been raised based on the allegations of the Action”).

5       **C.     The Proposed Settlement Does Not Improperly Grant Preferential Treatment**  
 6           **to Class Representatives or Segments of the Class**

7       The relief provided in the settlement will benefit all Class Members equally. The  
 8 settlement does not improperly grant preferential treatment to the Named Plaintiffs or any other  
 9 segments of the Class.

10      Each Settlement Class Member, including the Named Plaintiffs, who have worked hours as  
 11 an hourly employee during the applicable period are entitled to payment based on the plan of  
 12 allocation. Each Participating Settlement Class Member’s lump sum payment will be determined  
 13 through the application of a formula, which will ensure that the settlement proceeds are distributed  
 14 to the Class Members on a pro rata basis, based on the number of workweeks during the  
 15 applicable class period in which they worked. Accordingly, the settlement does not unfairly give  
 16 preferential treatment to any segments of the class. *See Tijero*, 301 F.R.D. at 324-25 (preliminary  
 17 approval to settlement granted where, among other things, “[t]here is no indication that the  
 18 proposed settlement improperly grants preferential treatment to class representatives or segments  
 19 of the class[, and] [t]he methodology agreed to by the parties for allocating the Net Settlement  
 20 Fund appears fair and reasonable”).

21       **D.     The Proposed Settlement Falls Well Within the Range of Possible Approval**

22      “To determine whether a settlement ‘falls within the range of possible approval’ a court  
 23 must focus on ‘substantive fairness and adequacy,’ and ‘consider plaintiffs’ expected recovery  
 24 balanced against the value of the settlement offer.’” *Bellinghausen v. Tractor Supply Co.*, 303  
 25 F.R.D. 611, 623 (citing and quoting *In re Tableware Antitrust Litig.*, 484 F. Supp. 2d 1078, 1080  
 26 (N.D. Cal. 2007)). A settlement falls within the reasonable range of approval even where it does  
 27 not realize the maximum recovery for the Plaintiffs. Indeed, “the very essence of a settlement is  
 28 compromise, a yielding of absolutes and an abandoning of highest hopes.” *Vasquez v. Coast*

1     *Valley Roofing, Inc.*, 266 F.R.D. 482, 489 (E.D. Cal. 2010) (citing and quoting *Linney v. Cellular*  
 2     *Alaska P'ship*, 151 F.3d 1234, 1242 (9th Cir. 1998)).

3                 In determining whether a settlement falls within the reasonable range of approval, the risks  
 4     of proceeding with the litigation rather than settling is always taken into account. *See, e.g., Tijero*,  
 5     301 F.R.D. at 324 (preliminarily approving settlement agreement in wage and hour action,  
 6     explaining that “based on its experience with similar actions, the Court finds that the settlement  
 7     amount of \$800,000 preliminarily appears to be fair, reasonable, and adequate in light of the  
 8     ‘maximum damage exposure’ calculated by Plaintiffs and the risks and costs attendant with further  
 9     litigation”). “It is well-settled law that a cash settlement amounting to only a fraction of the  
 10    potential recovery does not per se render the settlement inadequate or unfair.”” *In re Mego Fin.*  
 11    *Corp. Sec. Litig.*, 213 F.3d 454, 459 (9th Cir. 2000), *as amended* (June 19, 2000) (citing and  
 12    quoting *Officers for Justice v. Civil Serv. Comm'n*, 688 F.2d 615, 628 (9th Cir. 1982)). In fact,  
 13    “there is no reason, at least in theory, why a satisfactory settlement could not amount to a  
 14    hundredth or even a thousandth part of a single percent of the potential recovery.” *In re*  
 15    *Ionosphere Clubs, Inc.*, 156 B.R. 414, 427 (S.D.N.Y. 1993). In *Rubio-Delgado v. Aerotek, Inc.*,  
 16    2015 WL 3623627, at \*9 (N.D. Cal. June 10, 2015), the Court explained that “[w]hether a  
 17    settlement that is between 0.67 percent and 6.7 percent of the expected recovery is within the  
 18    range of possible approval depends on the strength of the plaintiffs' case; the risk, expense,  
 19    complexity, and likely duration of further litigation; the risk of maintaining class action status  
 20    throughout the trial; the extent of discovery completed and the stage of the proceedings; and the  
 21    experience and views of counsel.” Under the facts of this case, the settlement falls well within the  
 22    range of possible approval, particularly when taking the substantial risks of continuing with this  
 23    litigation into account.

24                 Plaintiffs are confident that they would have been able to maintain a class action for some  
 25     or all of the claims asserted, and in particular, claims for off-the-clock work relating to mandatory  
 26     online training for Outback employees. Discovery conducted prior to settlement confirmed that  
 27     Outback mandated training through its BBI University online portal and that the vast majority of  
 28     employees were not paid for their time in completing such training. While Plaintiffs believe their

1 claims were properly asserted, “there is always risk inherent in a jury trial and that risk cannot be  
 2 discounted.” *Hester v. Vision Airlines, Inc.*, 2014 WL 1366550, at \*4 (D. Nev. Apr. 7, 2014).  
 3 Moreover, Defendants ardently denied liability and intensively litigated nearly every aspect of this  
 4 Action, an approach that could frustrate Plaintiffs’ ability to recover the full damages they seek  
 5 and protract this litigation. In this regard, Defendants pointed to the purported admissions of  
 6 various Class Members obtained during discovery in which such Class Members stated they were  
 7 not paid less than the federal minimum wage and that they did not work off-the-clock. In addition,  
 8 although Defendants identified more than 140,000 employees to whom notice of preliminary  
 9 approval was originally sent in 2015, less than seven percent (7%), or 9,491, actually submitted  
 10 consent forms. Springmeyer Decl. at ¶ 10. Of the 9,491, less than half were responsive to  
 11 requests by Class Counsel for additional information concerning their alleged claims and, of those  
 12 who did respond, several could not identify any off-the-clock or overtime work. *Id.* The  
 13 relatively small number of employees who took action to assert and support their claims  
 14 influenced the amount Defendants were willing to offer towards settlement. *Id.*

15 Additionally, while Plaintiffs believe that collective and class action treatment is  
 16 appropriate in this case, Defendants will strenuously argue that class or collective action treatment  
 17 is not appropriate here, contending there are too many variations and individualized issues  
 18 presented within Plaintiffs’ proposed class. *Id.* at ¶ 11. In support of their contentions,  
 19 Defendants point to the discovery responses of the Collective Action Discovery Plaintiffs set forth  
 20 in section II.B., above, which appears to suggest that relatively large numbers of Class Members  
 21 admitted, among other things, that: “Outback Time” was not a term communicated to them by any  
 22 manager of an Outback Steakhouse restaurant; they were aware that Defendants had a policy  
 23 prohibiting off-the-clock work; they did not work enough hours in a week to reach the FLSA’s  
 24 overtime threshold; they did not work at any events (charitable, catering or marketing) sponsored  
 25 by an Outback Steakhouse restaurant; their off-the-clock experiences differed by shift; their off-  
 26 the-clock experiences differed by manager; their off-the-clock experiences differed by job duties;  
 27 their off-the-clock experiences differed by job position; their off-the-clock experiences differed by  
 28 location; and, they did not make any record of their off-the-clock work. *Id.* Obviously this

1 evidence pointed to by Defendants creates significant obstacles to Plaintiffs' ability to avoid  
 2 decertification of the collective action and to obtain class certification in this case.

3 Plaintiffs acknowledge that in several recent large FLSA collective actions, courts  
 4 decertified collective actions due to disparate factual and employment settings of collective action  
 5 plaintiffs and disparate affirmative defenses. *See, e.g., Mathis v. Darden Restaurants*, 2014 WL  
 6 4428171, at \*6 (S.D. Fla. Sept. 1, 2014) (decertifying FLSA collective action brought by  
 7 employees of Darden restaurant chains); *Stiller v. Costco Wholesale Corp.*, 298 F.R.D. 611, 630-  
 8 33 (S.D. Cal. 2014) (decertifying FLSA collective action and Rule 23 class action).

9 If the Court decertified the collective action and declined to certify state-level classes, then  
 10 most absent Class Members would lose their best opportunity to recover damages from  
 11 Defendants. Settlement, on the other hand, eliminates any risk that the FLSA collective action  
 12 would be decertified or that Plaintiffs would be unsuccessful in certifying state-based classes and  
 13 maintaining certification through trial. *See, e.g., Harris*, 2012 WL 3277278, at \*6 (risk that class  
 14 certification motion could be denied weighed in favor of preliminary approval); *Vanwagoner v.*  
 15 *Siemens Indus., Inc.*, 2014 WL 7273642, at \*6 (E.D. Cal. Dec. 17, 2014) (same).

16 In analyzing their claims through the discovery process, Plaintiffs determined that while  
 17 individuals may have viable claims for pre- and post-shift off-the-clock work, unpaid meetings,  
 18 etc., the only claim that would likely survive a motion for decertification or a motion for class  
 19 certification would be a claim based upon unpaid online training, as this claim suffers from less  
 20 variance from employee-to-employee, store-to-store, and manager-to-manager. Based on  
 21 Plaintiffs' analysis of data received from Class Members, Plaintiffs, with assistance from their  
 22 expert consultant, calculated that during the applicable time frame, Outback employees completed  
 23 an average of 11.9 hours of online training. Springmeyer Decl. at ¶ 12. Thus, extrapolating the  
 24 average hours of online training at \$7.25, the total potential damages that might be awarded is  
 25 \$12.4 million.<sup>10</sup> The settlement agreement requires Defendants to pay \$3 million, which is more  
 26

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27 <sup>10</sup> Plaintiffs' estimate assumes that all Class Members were uncompensated for online training.  
 28 While the majority of Class Members reported not being paid for online training, Defendants' pay  
 (footnote continued)

1 than 24% of this total amount (*id.*), well within the range of possible approval indicated in the  
 2 relevant case authority.<sup>11</sup>

3       While the potential recovery if Plaintiffs had prevailed could have been larger than the  
 4 proposed settlement amount, based on the inherent uncertainty of a jury trial, the uncertainty of  
 5 collective action decertification, proposed class certification of several state-level classes, and  
 6 other obstacles to establishing liability on Plaintiffs' claims, the proposed settlement is well within  
 7 the range of approval and should be finally approved. *See Hanlon*, 150 F.3d at 1027 (reviewing  
 8 court should defer to "the private consensual decision of the parties" familiar with the case  
 9 regarding appropriateness of settlement); *Officers for Justice v. Civil Serv. Comm'n of City &*  
 10 *Cnty. of San Francisco*, 688 F.2d 615, 625 (9th Cir. 1982) (fairness hearing should not be turned  
 11 into a "rehearsal for trial on the merits" but should assess whether settlement taken as a whole is  
 12 fair, reasonable, and adequate); *Nat'l Rural Telecommunications Coop. v. DIRECTV, Inc.*, 221  
 13 F.R.D. 523, 526 (C.D. Cal. 2004) (quoting 5 *Moore's Federal Practice*, § 23.85[2][b] (Matthew  
 14 Bender 3d ed. 1997)) ("proposed settlement is not to be judged against a speculative measure of  
 15 what might have been awarded in a judgment in favor of the class").

16       **E.     The City of Seattle Factors Support Final Approval**

17       In addition, when determining whether a class settlement ultimately is fair – at the final  
 18 settlement approval hearing – courts examine the following factors: (1) the strength of plaintiff's  
 19 case; (2) the risk, expense, complexity, and likely duration of further litigation; (3) the risk of  
 20 maintaining class action status throughout the trial; (4) the amount offered in settlement; (5) the  
 21 extent of discovery completed, and the stage of the proceedings; (6) the experience and views of  
 22 counsel; (7) the presence of a governmental participant; and (8) the reaction of the Class Members  
 23 to the proposed settlement. *See City of Seattle*, 955 F.2d at 1291; *Hanlon*, 150 F.3d at 1026

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24  
 25 records reflect that some Class Members who believed they were not paid for online training were  
 26 paid for some or all of the time spent on online training, further complicating Plaintiffs' ability to  
 27 recover on behalf of the Class.

28  
 29<sup>11</sup> On an individual basis, as further discussed below, the 18,091 Class Members stand to receive  
 30 an average of \$30.56. At \$7.25 per hour, this amount equates to 4.2 hours.

1 (citations omitted). “Courts have, at times, engaged in a ‘preliminary evaluation’ of these factors  
 2 to determine whether a settlement is fair, adequate, and reasonable.” *Hester*, 2014 WL 1366550, at  
 3 \*3.

4       1.     The Parties Dispute the Strength Of Plaintiffs’ Claims and Whether the  
 5                 Claims Can Be Certified Under Rule 23.

6       As discussed above, Plaintiffs believe that their claims are strong and that they would  
 7 succeed both in establishing class or collective treatment of these claims and on the merits of these  
 8 claims. Nevertheless, there is a real risk that Plaintiffs could fail to obtain class or collective  
 9 treatment of this case and that Plaintiffs would not prevail on the merits. Defendants for example,  
 10 would contest similarly situated and predominance standards under the FLSA and Rule 23, as well  
 11 as state law companion class action rules. This is an off-the-clock case. Thus, at the heart of  
 12 Defendants’ argument would be the fact that each class member worked different shifts, at  
 13 different locations, under different managers, and were given different instructions. Whether a  
 14 common policy and common evidence would prevail is “up in the air” at best.

15       If the Court declined to certify the class, then most absent Class Members would lose their  
 16 best opportunity to recover from Defendants. Opt-in Plaintiffs would have to continue to  
 17 participate in the litigation and go to trial. Settlement, on the other hand, eliminates any risk that  
 18 Plaintiffs would face decertification of the collective action, not successfully obtain certification of  
 19 various state-based classes, and maintain collective action and class certification through trial.

20       In light of these risks, the proposed settlement is advantageous for the Class and should be  
 21 finally approved.

22       2.     Further Litigation Will Be Extensive and Complex and Cause the Parties to  
 23                 Incur Significant Risk and Expense.

24       Throughout the previous two years of litigation, this nationwide case has proven to be  
 25 complex, expensive, and time-consuming. Unless the settlement is approved, it is likely the parties  
 26 will continue to vigorously litigate the case, which – despite its years and the significant  
 27 investment of time by counsel on both sides – is only at the outset of discovery. *See Hester*, 2014  
 28 WL 1366550, at \*4 (years of litigation and an appeal, among other things, suggested parties would

1 continue to litigate for years absent settlement). Litigation of the parties' claims could involve  
 2 hundreds of depositions throughout the United States, briefing class certification, briefing  
 3 dispositive motions, and preparing for and conducting trial. *See Rodriguez v. W. Publ'g Corp.*,  
 4 563 F.3d 948, 966 (9th Cir. 2009) ("serious hurdles" remaining such as defendant's anticipated  
 5 motion for summary judgment and appeals that would prolong litigation and recovery by Class  
 6 Members, favored settlement). In light of the substantial additional expense the parties will incur  
 7 if litigation proceeds, final approval of the settlement is warranted.

8           3.       The Amount Offered in Settlement Will Fairly and Adequately Compensate  
 9                   Class Members

10          As discussed above, the \$3 million which Defendants have agreed to pay in settlement of  
 11 this case fairly and adequately compensates Class Members. The value of this settlement is  
 12 enhanced due to the barriers Class Members would face if they attempted to pursue their claims on  
 13 an individual basis. Damages would be measured in minutes, and in limited cases, hours per week  
 14 for people who earn in most instances just above the minimum wage. Given their relatively low  
 15 individual damages, it would be uneconomical for Class Members to litigate individually. *See*  
 16 *Local Joint Exec. Bd. Of Culinary/Bartender Trust Fund v. Las Vegas Sands, Inc.*, 244 F.3d 1152,  
 17 1163 (9th Cir. 2001), *cert. denied*, 534 U.S. 973 (2001) ("*Local Joint Exec. Bd.*") (recognizing  
 18 class treatment is preferable where there is disparity between litigation costs and damages).

19          As previously described, the Settlement Agreement approved by this Court contains a two-  
 20 step approach to calculating settlement funds that will go to Class Members who returned claim  
 21 forms and/or were otherwise included as Class Members. Each Class Member will receive the  
 22 "Hours Claim Benefit," which is a pro-rata share of the Net Settlement Fund based on the number  
 23 of hours recorded in the Participating Settlement Class Member's payroll records during the  
 24 applicable class period (which varies, depending on the state in which the employee worked) as a  
 25 fraction of all hours recorded in Defendants' payroll records by all Settlement Class Members  
 26 during the applicable class periods. ECF No. 419-1 at ¶ 2.7(B). Necessarily, under the formula,  
 27 those employees who have worked more hours during the Applicable Period, as defined in the  
 28 Settlement Agreement, would receive a greater share of the Net Settlement Fund than employees

1 who worked less hours. Several states have longer statutes of limitation periods for unpaid wage  
 2 claims, such as Illinois, thus Class Members in those states have the opportunity to receive a larger  
 3 share of the Net Settlement Fund. In short, the Hours Claim Benefit is the amount that each Class  
 4 Member would have received if all Class Members submitted claims forms. Based upon the  
 5 number of Class Members who are eligible to receive a portion of the Net Settlement Fund, the  
 6 Hours Claim Benefit totals \$162,071.72. Myette Decl., Ex. B, at ¶ 18.

7       In addition, each Class Member who has a claim will receive a pro rata share of at least  
 8 50% of the Residual Claim Benefit Fund – which is comprised of the remainder of the Net  
 9 Settlement Fund that is not claimed by Class Members. That Fund represents unused settlement  
 10 benefit funds that were originally negotiated to pay class members before the claims period closed,  
 11 plus fees not included in the initial \$1.5 million fee allocation. In essence, the Class Member  
 12 portion of the Residual Clam Benefit Fund is a pour-over benefit of monies not needed to  
 13 compensate a larger participation rate as a result of other Class Members' failure to submit claim  
 14 forms. The total pour over for Class Members who submitted claim forms under the Residual  
 15 Claim Benefit Fund is \$390,710.54. *Id.* at ¶ 18.

16       It is difficult to apply an average anticipated award to Class Members, as the number of  
 17 hours worked during the Applicable Time Period varies widely, from 1 hour to 23,783.6 hours. *Id.*  
 18 at ¶ 19. With that caveat, the 18,091 Class Members stand to receive an average of \$30.56, which  
 19 at \$7.25 per hour equates to 4.2 hours. For those who worked more hours, the amount is  
 20 substantially more, up to the equivalent of 53 hours at \$7.25 per hour. *Id.* at ¶ 20.

21       Plaintiffs' strongest claim, and the one most likely to survive an anticipated motion for  
 22 decertification if litigation had proceeded, related to uncompensated online training through BBI  
 23 University. Based upon the information available through discovery, employees surveyed took  
 24 approximately two to 2.5 hours of online training courses per year. Springmeyer Decl., Ex. A, at  
 25 ¶ 13. Thus, *on average*, Class Members stand to receive compensation for approximately two  
 26 years' worth of unpaid training time. All things considered, Plaintiffs' counsel believe that  
 27 recovering an average of two years' worth of pay for Class Members' likely claims is a substantial  
 28 victory. Accordingly, the amount offered in the settlement, as well as its proposed allocation,

1 weighs strongly in favor of final approval.

2       4.     Plaintiffs Have Conducted Sufficient Discovery and Investigation to Assess  
 3                   Settlement

4       Plaintiffs agreed to settle this case only after more than two years of litigation and  
 5 extensive discovery and investigation. Class Counsel's combined lodestar is itself approaching \$3  
 6 million and not a penny of that was wasted time or effort. Interviews with Class Members  
 7 confirmed many of the challenges inherent in pursuing these claims and maintaining them as  
 8 collective and class actions. As a result, Plaintiffs and Class Counsel "had access to sufficient  
 9 information to adequately evaluate the merits of the case and weigh the benefits of settlement  
 10 against further litigation." *Hester*, 2014 WL 1366550, at \*5.

11      5.     In Light of Their Experience and Knowledge of the Case, Class Counsel  
 12                   Believes the Settlement is Reasonable, Fair, and Adequate

13       "Great weight is accorded to the recommendation of counsel, who are most closely  
 14 acquainted with the facts of the underlying litigation," *Nat'l Rural Telecommunications Coop.*,  
 15 221 F.R.D. at 528 (C.D. Cal. 2004) (citations and internal quotations omitted), and here Class  
 16 Counsel believes the settlement is fair, reasonable, and adequate in light of the circumstances of  
 17 the case. Springmeyer Decl. at ¶ 10. Class Counsel are experienced wage and hour class action  
 18 litigators. *Id.* at ¶¶ 14-17. While Class Counsel believe that Plaintiffs' claims are meritorious, they  
 19 understand the outcome of decertification, state-based class certification, dispositive motions, trial,  
 20 and potential additional appeals are inherently uncertain. *Id.* at ¶¶ 10-12. Moreover, if this  
 21 litigation continues, it may be years before Class Members receive any recovery. *Id.* This  
 22 settlement will allow Class Members to promptly recover money to compensate them for any  
 23 minimum wage violations and uncompensated off-the-clock work they performed. Class Counsel  
 24 believe this is a very good outcome given the risks and delays in pressing forward. *See Rodriguez*  
 25 *v. W. Publ'g Corp.*, 563 F.3d 948, 967 (9th Cir. 2009) ("[p]arties represented by competent  
 26 counsel are better positioned than courts to produce a settlement that fairly reflects each party's  
 27 expected outcome in litigation") (citations and internal quotations omitted).

28

1           6.       Class Members Informed of the Settlement Have Reacted Positively

2           Class Members informed of the settlement have overwhelmingly reacted positively to the  
 3 proposed settlement. Class Counsel initially explained the material terms of settlement to the  
 4 twenty-one (21) active Named Plaintiffs, who gave their unanimous approval to the settlement.  
 5 Springmeyer Decl. at ¶ 10. After preliminary approval, notice was sent to 166,786 identified  
 6 Class Members. *See* Myette Decl., Ex. B, at ¶ 10. Only 26 of the 166,786 Class Members, or .015  
 7 percent of the class, sought to be excluded from the class and not a single one of the 166,786 Class  
 8 Members timely objected to the proposed settlement. *See id.* at ¶¶ 14-15. In light of the positive  
 9 reaction to the settlement, final approval should be granted.

10         **IV.     THE COURT SHOULD APPROVE THE REQUESTED SERVICE AWARDS**

11         The Settlement Agreement here contemplates class representatives who are no longer  
 12 employed by Defendants each receiving service awards in the amount of \$5,000 and class  
 13 representatives who remain employed by Defendants each receiving service awards in the amount  
 14 of \$2,500, both subject to the Court's approval.<sup>12</sup>

15         "[I]t is well-established that the court may grant a modest incentive award to class  
 16 representatives, both as an inducement to participate in the suit and as compensation for time spent  
 17 in litigation activities, including depositions." *In re Toys R Us-Delaware, Inc.--Fair & Accurate*  
 18 *Credit Transactions Act (FACTA) Litig.*, 295 F.R.D. 438, 470 (C.D. Cal. 2014). In fact, "Courts  
 19 routinely approve incentive awards to compensate named plaintiffs for the services they provide  
 20 and the risks they incurred during the course of the class action litigation." *Vasquez v. Coast*  
 21 *Valley Roofing, Inc.*, 266 F.R.D. 482, 490 (E.D. Cal. 2010) (citing and quoting *Ingram v. The*  
 22 *Coca-Cola Co.*, 200 F.R.D. 685, 694 (N.D. Ga.2001)).

23         "Whether to authorize an incentive payment to a class representative is a matter within the  
 24 court's discretion." *Id.* The criteria courts consider in determining whether to approve an

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25  
 26         <sup>12</sup> The reason for the difference in the amounts of incentive awards is that class representatives  
 27 who are no longer employed by Defendants have agreed not to seek employments with Defendants  
 in the future, while those who are still employed by Defendants are permitted to continue in their  
 employment.

1 incentive award include: “1) the risk to the class representative in commencing suit, both financial  
 2 and otherwise; 2) the notoriety and personal difficulties encountered by the class representative; 3)  
 3 the amount of time and effort spent by the class representative; 4) the duration of the litigation[;]  
 4 and[ ] 5) the personal benefit (or lack thereof) enjoyed by the class representative as a result of the  
 5 litigation.” *Id.* (citing and quoting *Van Vranken v. Atlantic Richfield Co.*, 901 F. Supp. 294, 299  
 6 (N.D.Cal.1995)). Each of these factors support the approval of the requested class representative  
 7 incentive awards here.

8       First, in agreeing to become named Plaintiffs, Plaintiffs undertook the financial risk of  
 9 becoming liable for Defendants’ costs in the event of a defense victory in this case. *See Vasquez,*  
 10 *supra*, at 491 (approving incentive awards to named plaintiffs of \$5,000, recognizing that  
 11 Plaintiffs “undertook the financial risk that, in the event of a judgment in favor of Defendant[s] in  
 12 this action, they could have been personally responsible for any costs awarded in favor of  
 13 Defendant[s].”) Plaintiffs also assumed the risk of potential stigma and reprisal for bringing this  
 14 action, either in their continued employment with Defendants or in connection with future  
 15 employment. *See Campbell v. First Investors Corp.*, 2012 WL 5373423, at \*8 (S.D. Cal. Oct. 29,  
 16 2012) (court preliminary approves incentive award sought by Plaintiff to compensate her for “for  
 17 her time, effort, risks undertaken for the payment of costs in the event this action had been  
 18 unsuccessful, and stigma upon future employment opportunities for having initiated an action  
 19 against a former employer”).

20       The other factors also support approval of the class representative service awards. Over  
 21 the two-year period during which this litigation has been pending, the named Plaintiffs spent  
 22 considerable time and effort in connection with this litigation, including meeting with Class  
 23 Counsel, providing documents and discovery responses, assisting Class Counsel in their  
 24 investigation, and sitting for depositions. The class representatives have received no personal  
 25 benefit as a result of their efforts on behalf of the class, to date. The incentive awards  
 26 contemplated by the settlement (\$5,000 for class representatives no longer employed by  
 27 Defendants and \$2,500 for class representatives who remain employed by Defendants) would be  
 28 their sole compensation for this service, above and beyond whatever payments they are entitled to

1 as Class Members.

2        In *In re Toys R Us-Delaware, Inc.*, the Court approved class representative service awards  
 3 of \$5,000 to each named plaintiff, noting that “[t]hese proposed awards are consistent with the  
 4 amount courts typically award as incentive payments.” *Id.* (citing *In re Mego Financial Corp.*,  
 5 213 F.3d at 463) (approving a \$5,000 incentive award for each class representative); *Faigman v.*  
 6 *AT & T Mobility LLC*, 2011 WL 672648, \*5 (N.D. Cal. Feb. 16, 2011) (approving an incentive  
 7 payment of \$3,333.33 for each of three class representatives, and noting that “[i]n [the Northern]  
 8 [D]istrict, incentive payments of \$5,000 are presumptively reasonable”); *Clesceri v. Beach City*  
 9 *Investigations & Protective Services, Inc.*, 2011 WL 320998, \*2 (C.D. Cal. Jan. 27, 2011)  
 10 (preliminarily approving an award of \$3,000 to two named plaintiffs); *Hartless v. Clorox Co.*, 273  
 11 F.R.D. 630, 646–47 (S.D. Cal. 2011) (approving an award of \$4,000 for one named plaintiff and  
 12 \$2,000 for another); *Dennis v. Kellogg Co.*, 2010 WL 4285011, \*3 (S.D. Cal. Oct. 14, 2010)  
 13 (preliminarily approving an incentive award of \$5,000); *Aguayo v. Oldenkamp Trucking*, 2006  
 14 WL 3020943, \*10 (E.D. Cal. Oct. 17, 2006) (preliminarily approving a settlement agreement,  
 15 which provided that class counsel would apply for an incentive award of no more than \$5,000 for  
 16 the named plaintiff).

17        As such, the service awards requested by Plaintiffs (\$5,000 for class representatives no  
 18 longer employed by Defendants and \$2,500 for class representatives who remain employed by  
 19 Defendants) is well within the range of what is presumptively reasonable, are supported by the  
 20 facts, and should thus be awarded as requested.

21        ///

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28        ///

## V. CONCLUSION

In the judgment of Plaintiffs and Class Counsel, the proposed settlement is a fair and reasonable compromise of the issues in dispute in light of the strengths and weaknesses of each party's case. Accordingly, Plaintiffs respectfully request that the Court grant final approval to the proposed settlement and enter the proposed Final Approval Order and Judgment submitted herewith.

DATED this 11th day of October, 2016.

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1                   **CERTIFICATE OF SERVICE**

2                   I hereby certify that on this 11th day of October, 2016, a true and correct copy  
3 of **PLAINTIFFS' MOTION FOR FINAL APPROVAL OF FLSA CLASS SETTLEMENT**  
4 was served via the United States District Court CM/ECF system on all parties or persons requiring  
5 notice.

6                   By /s/ Christie Rehfeld  
7                   Christie Rehfeld, an Employee of  
8                   WOLF, RIFKIN, SHAPIRO, SCHULMAN &  
9                   RABKIN, LLP

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